

POPULISM AND DE-JUDICIALIZATION OF POLITICS

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Prohlašuji, že jsem esej na téma "Populism and de-judicialization of politics" zpracoval sám a uvedl jsem všechny použité prameny. Dávám souhlas s prvním zveřejněním své eseje vyhlášovateli soutěže nebo spolupracujícími institucemi v papírové či elektronické podobě.

I. Introduction

In the past decades, the judiciary has become a major actor in legislative politics. Especially constitutional courts (CCs) have been involved not only in deciding individual disputes, but have turned into actors resolving major political and moral issues of our times worldwide – from legality of death sentence over transitional justice issues to questions of social and financial policies. Moreover, specifically in Central and Eastern European post-communist countries, CCs were entrusted with ensuring smooth transition to regimes based on democracy, rule of law and human rights.

CCs' power to strike down unconstitutional legislation and orchestrate other public authorities in a way respecting rule of law and human rights has given rise to voluminous literature addressing the judicialization of politics.¹ Scholars argue that legislators' zone for political decisions has been significantly curtailed by CCs. Although judicialization has been perceived as a one-way path, recent rise of populism across the globe poses a challenge to the judicialization theory. This essay argues that populists in government aim for a contrary process of de-judicializing politics. As an ideology, populism is based on unmediated and instant enforcement of the will of the ordinary people. Hence, the populist vision of democracy is at odds with the intermediary institutions and powerful checks and balances structures, such as CCs. As a result, populists in government use various strategies to transform the judicialized triadic structure of politics (two political adversaries and an independent judicial umpire) back to a dyadic system (competition of political adversaries lacking the limiting factor of judicialization).

The aim of this essay is twofold – to map and analyze the court-curbing strategies used by populists in government, and to assess the consequences of the populist de-judicialization crusade. The essay shows that the populist court-curbing strategies are creative and encompass both short-term and long-term de-judicialization techniques. Short-term techniques aim to prevent courts from blocking the fundamental populist reforms designed to consolidate the populist regime. Long-term strategies aim to block the possibility of transferring policy issues from parliament to the court, or to turn a CC into a loyal actor legitimizing the government's steps. The aim is to “tame” the court and strip it of its effective veto player status.

¹ See Christoph Hönnige, *Beyond Judicialization: Why We Need More Comparative Research about Constitutional Courts*, 10 EUROPEAN POLITICAL SCIENCE 346, 347 (2011).

Although judicialization is not an unqualified good, part V of this essay argues that de-judicialization driven by the effort to eliminate checks on the government is a troubling phenomenon. It implies a threat for substantive values such as human rights protection, but also for formal and procedural aspects of democracy. More specifically, the populist strive for de-judicialization likely decreases the accountability of the governing elite for its lawmaking activities, lowers supervision of fairness of democratic procedures, and it takes away an important political participation channel from ordinary citizens. Hence, the study of the populist quest for de-judicialization confirms that populism in practice is pre-occupied with immediate enforcement of a particular view of the good at the expense of pluralism and democratic participation and deliberation.

The paper proceeds in six parts. Part II briefly summarizes the scholarship addressing the judicialization of politics. Part III reconstructs the fundamental features of populism as an ideology and a political style to understand the populist irritation with judicialization of politics. Part IV examines the various faces of de-judicialization of lawmaking. It uses the case studies of de-judicialization in Hungary and Poland in order to detect general patterns of de-judicialization strategies and their explanations. Part V assesses the phenomena of de-judicialization and shows what values are at risk. Part VI concludes.

II. The Judicialization Hypothesis

In the past decades many authors have argued that democratic politics has been shifting towards juristocracy due to the spread of new constitutionalism distinctive by judicially enforced protection of fundamental rights.² In practice, new constitutionalism often leads to significant judicialization of politics. Hirschl defines judicialization of politics as “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.”³

Increasing judicialization has changed the institutional environment of lawmaking. Judicialization resulted in a shift from a dyadic to triadic structure of legislative politics.⁴ Before politics was judicialized, lawmaking had taken place within a dyadic environment. That was characterized by mutual negotiations among political actors using political means. However,

² RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2007).

³ Ran Hirschl, *Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 119, 119 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008).

⁴ Alec Stone Sweet, *Judicialization and the Construction of Government*, 32 *COMPARATIVE POLITICAL STUDIES* 147, 148 (1999).

the introduction of judicially enforceable written constitutions gradually shifted the lawmaking environment towards a triadic structure.⁵ It was supplemented with a third actor – a court with the power of judicial review of legislation. Thus, the political techniques of communication and negotiation were complemented by *legal* means of achieving legislative change.

Hence, when a weaker political actor (usually the opposition party) loses the battle over new legislation in the parliament, it can still alter the policy through a judicial battle. Such a possibility to continue the political combat in legal terms has further consequences. The losing group of lawmakers has incentives to activate a court frequently, which tends to enhance the level of judicialization. Thereby, triadic dispute resolution mechanism “appears, stabilizes, and develops authority over the normative structure.”⁶ CCs decide about particular pieces of legislation but also weave a wider web of constitutional jurisprudence. Accordingly, the constraints imposed on the legislators tend to widen and thicken and they infiltrate the legislative politics. Stone Sweet speaks about the pedagogical function of constitutional adjudication vis-à-vis the lawmakers,⁷ and conceives judicialization of politics as a process “by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another.”⁸ As a result, the dyadic (purely political) structure of lawmaking is “inevitably placed in the shadow of triadic rule making.”⁹

The judicialization hypothesis presupposes that CCs have some autonomous decision-making space. However, some political scientists claimed that CCs are peripheral to politics¹⁰ or that they belong to the dominant political alliance and support it.¹¹ Tsebelis denoted CCs as mere “random noise”¹² without the effective veto player status. According to Tsebelis, CCs’ veto capacity is usually absorbed because the judges are selected by other veto players.¹³ Nevertheless, other authors persuasively argued that CCs *are* veto players, at least under certain

⁵ See Stone Sweet, *supra* note 4; MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-2 (1981).

⁶ Stone Sweet, *supra* note 4, at 164.

⁷ ALEC STONE SWEET, GOVERNING WITH JUDGES 194-204 (2000); see also John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW AND CONTEMPORARY PROBLEMS 41, 42 (2002).

⁸ Stone Sweet, *supra* note 4, at 164

⁹ *Id.*, at 158.

¹⁰ FRITZ SCHARPF, GAMES REAL ACTORS PLAY: ACTOR-CENTERED INSTITUTIONALISM IN POLICY RESEARCH 98 (1997).

¹¹ Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957).

¹² GOERGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 81 (2002).

¹³ By veto players, Tsebelis understands „actors whose agreement is necessary for a change of the status quo.“ Tsebelis, *supra* note 12.

conditions.¹⁴ Indeed, CCs have enjoyed quite a wide autonomous decision-making space in liberal democracies due to two main factors – institutional safeguards of judicial independence and widely shared political norms of non-interference with the judiciary.¹⁵ As a result, the global expansion of judicial review of legislation led to considerable, although uneven, judicialization of lawmaking across the globe.¹⁶

To summarize, judicialization affects lawmaking in the following ways. First, it imposes substantive constraints on lawmakers as CCs rule out certain policies as unconstitutional.¹⁷ Second, in the long-term perspective judicialization reinforces de-politicization of certain constitutionalized sphere of law, which lawmakers can hardly touch. This feature is even stronger in jurisdictions where courts apply the unconstitutional constitutional amendment doctrine and reserve the right to assess the constitutionality of constitutional amendments.¹⁸ Third, through the pedagogical effect, CCs’ case law effects are also prospective as lawmakers anticipate courts’ reactions when drafting new legislation.¹⁹ Fourth, the rhetoric of lawmaking tends to change. One can witness the influence of constitutional language on parliamentary debates. Finally, all of those effects tend to intensify throughout time – the more case law exists, the more constraints arise and the more opportunities for the opposition emerge to transfer the dispute to a court. Still, all those effects are nowadays challenged by the rise of populism.

III. The Populist Irritation with Judicialization

The listed effects of judicialization are at odds with the populist idea how democracy should be functioning. According to Mudde, populism is “an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus

¹⁴ Sylvain Brouard & Christoph Hönnige, *CCs as Veto Players: Lessons from the United States, France and Germany*, 56 EUR J POL RES 529 (2017).

¹⁵ R. Daniel Kelemen, *The political foundations of judicial independence in the European Union*, 19 JOURNAL OF EUROPEAN PUBLIC POLICY 43-44 (2012); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2009).

¹⁶ Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 81 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008). On judicialization in the Czech context see SOUDCOKRACIE, NEBO JUDICIALIZACE POLITIKY? (Hubert Smekal & Ivo Pospíšil eds., 2013); Lubomír Kopeček & Jan Petrov, *From Parliament to Courtroom: Judicial Review of Legislation as a Political Tool in the Czech Republic*, 30 EAST EUROPEAN POLITICS AND SOCIETIES 120 (2016).

¹⁷ Ferejohn, *supra* note 7, at 41.

¹⁸ See Yaniv Roznai, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS* (2017).

¹⁹ See *supra* note 7.

‘the corrupt elite’, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.”²⁰

Thus, populism is built around specific understanding to the concepts of the people and popular will, and adjusts politics to this view. In short, populists claim that politics should be about immediate enforcement of the will of the ordinary people (rather than the elites) in an authentic and uncompromised way. Such a popular will is recognizable by common sense by the populist leaders. As a result, populism does not need, actually rejects, intermediary institutions and procedures.²¹ Müller adds an important point that populists are not only anti-elitist but also anti-pluralist and claim exclusive representation of the “real” people.²²

The authenticity of the popular will’s enforcement has crucial repercussions for the populists’ view of politics. In opposition to liberal democracy, populists criticize the constraints imposed on majoritarian democracy – be it constraints arising from international treaties, checks and balances procedures, or the language of political correctness.²³ In this respect, the populist ideology is very close to Carl Schmitt’s critique of liberal constitutionalism. Indeed, Schmitt was said to have provided a systemic elaboration of the logic of populism.²⁴

Schmitt criticized the entire idea of constitutional democracy as a self-contradictory project.²⁵ In his view, democracy is a form of political sovereignty that presupposes substantial homogeneity and collective unity of the people.²⁶ Schmitt thus conceives democracy as the “unconstrained political expression of a particular people’s collective identity.”²⁷ Hence, he rejects the normative universalism and constraining nature of liberal constitutionalism as undemocratic. Constitutionalism prevents true expression of political sovereignty and the popular will. Through the rights catalogues and checks and balances procedures, liberal constitutionalism diminishes the political sovereignty of the people. Thus, according to Schmitt, constitutional democracy is at best a half-hearted democracy.²⁸ Instead, the popular will should

²⁰ Cas Mudde, *The Populist Zeitgeist*, 39 GOVERNMENT AND OPPOSITION 542, 543 (2004).

²¹ Nadia Urbinati, *The Populist Phenomenon*, 51 RAISONS POLITIQUES 137 (2013).

²² JAN-WERNER MÜLLER, WHAT IS POPULISM 20 (2016).

²³ Mudde, *supra* note 20, at 561; Paul Blokker, *Populist Constitutionalism*, VERFASSUNGSBLOG (May 4, 2017), <http://verfassungsblog.de/populist-constitutionalism/>.

²⁴ Koen Abts & Stefan Rummens, *Populism versus Democracy*, 55 POLITICAL STUDIES 405, 415 (2007).

²⁵ Heiner Bielefeldt, *Carl Schmitt’s Critique of Liberalism*, in LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM 23, 27 (David Dyzenhaus ed., 2014).

²⁶ *Id.*, at 27.

²⁷ *Id.*, at 27.

²⁸ *Id.*, at 28.

be supreme to the constitutional norms: “In a democracy the people is the sovereign; it can break through the entire system of constitutional norms.”²⁹

The populist vision of the people and the popular will brings the populists’ view of constitutional democracies close to Schmitt’s one. Populism wants to repoliticize the public sphere³⁰ and refuses the checks on policy-making advocated by liberal constitutionalism.³¹ Accordingly, populists hold the position that the constituent power of the people is not consumed by the process of constitution-making. It is still present to be exercised by the people, which means that constitutional law is not necessarily supreme to politics.³²

Due to the recent significant electoral success of the populist parties across the world, we have experienced populism not only in the ideational dimension, but also in the sphere of practical politics. Müller points out that populists in government substantially differ from their times in opposition.³³ He argues that populists in government use three main strategies of governance: colonization of the state, mass clientelism and discriminatory legalism, and repression of civil society.³⁴ The first feature is crucial for the focus of this essay – populists tend to “occupy” the state by consolidating or even perpetuating their power.³⁵ Populists do that quite openly, invoking the claim of enforcing the popular will effectively.³⁶

IV. Faces of Populist De-judicialization: Paralyzing and Taming CCs

The judiciary – CCs in particular – often belongs among the first targets of the populist strategy of state colonization. The operation of CCs, especially those with wide access channels and powerful competences, tends to bring about high levels of judicialization and constraints on policymaking. In the view of many populists, judicialization by CCs compromises the popular will. Judicialized politics does not authentically represent the will of the ordinary people. CCs create a major obstacle for the realization of the Schmittian view of democracy as an exercise of the people’s political sovereignty. Moreover, the CCs are likely to employ their veto powers vis-à-vis the populist legislation and act as obstacles to the populist reform projects.³⁷ Hence,

²⁹ CARL SCHMITT, *VERFASSUNGSLEHRE* 275 (1928). See Bielefeldt, *supra* note 25, at 28.

³⁰ Mudde, *supra* note 20, at 555.

³¹ Urbinati, *supra* note 21, at 147.

³² Gábor Halmai, *Populist Constitutionalism – An Oxymoron?* EUI BLOG (Nov 14, 2017).

³³ Jan-Werner Müller, *Populism and Constitutionalism*, in *THE OXFORD HANDBOOK OF POPULISM* 590, 596 (Cristóbal Rovira Kaltwasser et al., 2017).

³⁴ Müller, *supra* note 33, at 596.

³⁵ *Id.*

³⁶ Müller, *supra* note 22, at 45.

³⁷ See Ben Stanley, *Confrontation by default and confrontation by design: strategic and institutional responses to Poland's populist coalition government*, 23 *DEMOCRATIZATION* 263, 273-4 (2016).

populists in government often attack CCs. As a result, the concerns about juristocracy seem to be overridden nowadays by concerns about the independence and authority of courts.

Attacking CCs does not necessarily mean their abolishment. Populists will not question the existence of a CC if it does not interfere with their project and delivers outcomes which are in line with their preferences.³⁸ Such an aim can be accomplished using different means and techniques. The following paragraphs depict the scenarios of curbing CCs in Hungary and Poland in order to understand the court-curbing techniques in their context.³⁹ However, this essay is not exclusively about Hungary and Poland. The aim is to learn general lessons about the populist quest against CCs, which are addressed further below.

Hungary

Since its electoral victory in 2010, which led to Fidesz party's gain of constitutional majority in the Parliament, the Hungarian populist regime led by Viktor Orbán has well consolidated its power.⁴⁰ One of his first targets was the Hungarian CC. What once was a poster child among post-communist CCs serving as an effective counter-balance to the Parliament,⁴¹ was circumscribed in competences, packed and disciplined to a large extent. Initially, the new government's idea was to abolish the CC and merge it with the Supreme Court.⁴² Although the CC retained its existence in the end, the government took several steps to gradually weaken it and essentially "tame" it. The most important means were the new constitution that came into effect in 2012 and the so-called Fourth Amendment to the constitution adopted in 2013. However, several measures against the CC's independent authority had been adopted even before the new constitution.

First, the system for electing the CC's judges was changed. Thereafter a single two-thirds vote of the Parliament was sufficient to elect a new judge. With a two-thirds majority in the Parliament, the new government had space to select its own preferred candidates without

³⁸ Müller, *supra* note 33, at 598.

³⁹ See Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 *ICON* 279 (2015), who argues that populist reforms have to be viewed in complex in their political and societal context, rather than as isolated steps.

⁴⁰ Patrick Kingsley, *How Viktor Orbán Bends Hungarian Society to His Will*, *NEW YORK TIMES* (March 27, 2018), <https://www.nytimes.com/2018/03/27/world/europe/viktor-orban-hungary.html>

⁴¹ Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 *THE GEORGETOWN LAW JOURNAL* 961, 973 (2011); László Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA* 5, 24 (Armin von Bogdandy et al., 2015).

⁴² Sólyom, *supra* note 41, at 23.

cooperating with the opposition.⁴³ Moreover, it even enlarged the space as it implemented a court-packing plan. The number of judges was increased from 11 to 15. Moreover, at the time of court-packing there were two vacancies. That gave the government a freedom to fill six seats on the bench.⁴⁴ During the first three years, the government managed to select nine judges of the CC in total.⁴⁵

Those personal changes had important implications for the court. Sólyom reported that the CC got into a “survival mode”, facing a division between the new and the old judges.⁴⁶ According to Sólyom, “a clearly identifiable block of the new judges has never voted for unconstitutionality of a law issued by the present majority or the government.”⁴⁷ Furthermore, the Hungarian CC also decides in smaller panels. Scheppele claims that the panels were composed so that “each panel of judges has a predictable post-2010 Fidesz majority.”⁴⁸

Second, as regards the personnel of the CC, the government also stripped the court of an important judicial self-government competence. Originally, the CC’s judges selected the Court’s President for a three-year term. This power was transferred to the Parliament that elects the CC’s President for 12 years.⁴⁹

Third, the government also restricted the access to the CC. Most importantly, it quashed the Hungarian constitutional law’s signature feature – *actio popularis*. *Actio popularis* denoted the possibility of anyone to initiate constitutional review of legislation, which assisted the CC in developing its case law and involved the people.⁵⁰ Instead, the government introduced a more traditional institution of constitutional complaint. Although the access of an individual was preserved, activation channels of the CC were restricted, especially since most of the offices empowered to initiate constitutional review were held by the government’s nominees.⁵¹

⁴³ Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111, 115 (Armin von Bogdandy et al., 2015).

⁴⁴ Sólyom, *supra* note 41, at 22.

⁴⁵ Scheppele, *supra* note 43, at 115.

⁴⁶ Sólyom, *supra* note 41, at 25.

⁴⁷ Sólyom, *supra* note 41, at 23, in particular footnote no. 40. See also Scheppele, *supra* note 43, at 115: “The new constitutional judges have almost always voted for the Fidesz government position in each case.”

⁴⁸ Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 51, 72 in note 85 (2014).

⁴⁹ Sólyom, *supra* note 41, at 22.

⁵⁰ Scheppele, *supra* note 43, at 116.

⁵¹ *Id.*, at 116.

Fourth, the Fidesz government has also employed jurisdiction stripping. The CC was barred from reviewing tax or budget laws.⁵² Furthermore, the so-called Fourth Amendment to the new Constitution restricted review of constitutional amendments exclusively to the procedural issues. The substance of constitutional amendments was immunized from judicial review.⁵³ At first sight, the latter limitation does not seem so controversial as the judicial review of constitutional amendments is not universally accepted. Moreover, the CC itself would refuse to review constitutionality of constitutional amendments.⁵⁴ What is crucial for understanding the measure is the way Fidesz government uses constitutional amendment. Sólyom describes the practice as “permanent constitution-making.”⁵⁵ By that time, the Orbán government routinely used constitutional amendment to override of the CC’s case law.⁵⁶

Fifth, the Fourth Amendment also voided all the pre-2012 case law of the CC. That was a major blow to the Court’s authority as even the “new” CC declared continuity with the previous case law. Yet, the Fourth Amendment stated that the pre-2012 case law ceased to be in force. That was a setback to the twenty years of constitutional developments in Hungary and, moreover, it erased the force of the judge-made constitutional law of Hungary.⁵⁷ This step effectively removed even the limitations on the government’s will inherited from the pre-Fidesz times, hence ending the possible “insurance” effects of the CC’s case law.⁵⁸

In sum, these measures have had far-reaching consequences for the CC and the rule of law in Hungary. Although the Hungarian CC was fighting back for about three years,⁵⁹ the constraints on lawmaking resulting from judicialization were largely eliminated. Essential parts of the government policies were entirely exempted from the review by CC. The remaining parts were strengthened by the possibility of constitutional override of the CC’s decision. Moreover, the discontinuity with the previous constitutional jurisprudence implies that the populist government managed to get rid even of the previous constitutional jurisprudence of the CC. Finally, the instalment of new judges through court packing and replacement of old judges led to “taming” of the CC. All in all, as Bugarič and Ginsburg put it, “the Fidesz government

⁵² Scheppele, *supra* note 43, at 117; Sólyom, *supra* note 41, at 21.

⁵³ Scheppele, *supra* note 43, at 117.

⁵⁴ Sólyom, *supra* note 41, at 25.

⁵⁵ *Id.*, at 27.

⁵⁶ *Id.*, at 27.

⁵⁷ Sólyom, *supra* note 41, at 29.

⁵⁸ According to the insurance theory, parties facing declining power can make use of CCs to “insure” the continuance of their preferred policies. See Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 *ICON* 988 (2017).

⁵⁹ See Scheppele, *supra* note 48, at 72 ff. (analyzing the judgments in which the CC resisted the government’s reforms).

drastically revised the Hungarian constitutional and political order by systematically dismantling checks and balances, thereby undermining the rule of law and transforming the country from a postcommunist democratic success story into an illiberal regime.”⁶⁰

Poland

Orbán’s steps provoked international reactions. Besides a lot of criticism, a supportive and approving voice came from Poland. In 2011, Jarosław Kaczyński – Poland’s former prime minister – endorsed Orbán’s strategy and stated that “[t]he day will come when we will succeed, and we will have Budapest in Warsaw.”⁶¹ Kaczyński’s prediction was right. In 2015, Kaczyński’s Law and Justice party (PiS) won the parliamentary election and gained the absolute majority of seats.

PiS started governing the country in a manner displaying they do not want to repeat the scenario from 2005-2007. In that period, Kaczyński’s populist government was quite successfully countered by independent actors, especially by the Polish Constitutional Tribunal,⁶² which has established itself as “a strong protector of democratic process and of limits upon the legislative and executive powers.”⁶³ This time, PiS government⁶⁴ did not want to do the same mistake and attacked the Constitutional Tribunal soon after taking the office. Kaczyński was very open about his motives too. He said he saw the Tribunal as a potential obstacle to PiS realizing its electoral promises.⁶⁵ He stated he wanted to break up the “band of cronies” who allegedly made up the Tribunal.⁶⁶

According to Sadurski, in the first phase of dismantling the Constitutional Tribunal, the Tribunal was paralyzed.⁶⁷ The initial step was the battle over the former Parliament’s appointees to the Tribunal. Shortly before the end of its term, the prior Parliament filled three vacancies with new judges. Yet, the MPs made a controversial step when they also elected two more

⁶⁰ Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 JOURNAL OF DEMOCRACY 69, 73 (2016).

⁶¹ Neil Buckley & Henry Foy, *Poland’s new government finds a model in Orbán’s Hungary*, FINANCIAL TIMES (Jan 6, 2016), <https://www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f>.

⁶² Stanley, *supra* note 37; Jan-Werner Müller, *The Problem with Poland*, THE NEW YORK REVIEW OF BOOKS (Feb 11, 2016), <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/>

⁶³ WOJCIECH SADURSKI, HOW DEMOCRACY DIES (IN POLAND): A CASE STUDY OF ANTI-CONSTITUTIONAL POPULIST BACKSLIDING 17 (2018), available at SSRN.

⁶⁴ Formally, Kaczyński has no position in the government. Still, he has a great de facto influence.

⁶⁵ R. Daniel Kelemen & Mitchell A. Orenstein, *Europe’s Autocracy Problem: Polish Democracy’s Final Days?*, FOREIGN AFFAIRS (Jan 7, 2016), <https://www.foreignaffairs.com/articles/poland/2016-01-07/europes-autocracy-problem>.

⁶⁶ *Poland’s government carries through on threat to CC*, THE GUARDIAN (Dec 23, 2015), <https://goo.gl/PfsM28>.

⁶⁷ Sadurski, *supra* note 63, at 18.

appointees on the place of judges whose mandate would run out two months later, i.e. after the end of the Parliament's term. Sadurski argues that this was done deliberately to prevent the upcoming Parliament from choosing the judges.⁶⁸ The Constitutional Tribunal declared those two appointments unconstitutional but confirmed the previous three.⁶⁹ Nevertheless, the PiS-backed President refused to swear in the three judges. Subsequently, the new PiS government declared all the five appointments invalid and instated five of its own nominees at the Constitutional Tribunal. Moreover, the PiS government later managed to instate one of the "new" judges to the position of the President of the Constitutional Tribunal. However, the "old" judges of the Constitutional Tribunal refused to hear cases with the PiS elected "new judges".⁷⁰

Soon after, the Parliament adopted several amendments to the Constitutional Tribunal Act, among them the so-called repair bill. Sadurski points out that these amendments had three main goals and effects – to exempt the new PiS legislation from effective constitutional review, to paralyze the court and to enhance the powers of the legislature and the executive vis-à-vis the Constitutional Tribunal.⁷¹ Although the repair bill seemed to be "custom-made to paralyze the court" and left the Tribunal "largely impotent,"⁷² the Constitutional Tribunal managed to strike back. It declared the repair bill unconstitutional as it prevented the court from reliable and efficient work. The government in turn refused to recognize the judgment and did not publish it in the official Gazette.⁷³

The crisis faded in the moment when the "new" judges elected by PiS gained majority at the Tribunal. By mid-2016 PiS has appointed nine judges to the Constitutional Tribunal.⁷⁴ According to Sadurski, the judges nominated by PiS – except one – have so far showed to be loyal to the government in all cases.⁷⁵ This effect was even augmented as the new President of the Constitutional Tribunal reshuffled the composition of the panels and removing the "old" judges from judge rapporteur position.⁷⁶

⁶⁸ *Id.*, at 19.

⁶⁹ Kelemen & Orenstein, *supra* note 65.

⁷⁰ The battle over the appointments was actually even more complicated, however there is not enough space in this essay to describe it fully. For details see Sadurski, *supra* note 63, at 18-24; or Anna Śledzińska-Simon, *Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts*, VERFASSUNGSBLOG (Nov 23, 2015), <https://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/>.

⁷¹ Sadurski, *supra* note 63, at 25-6.

⁷² Bugarič & Ginsburg, *supra* note 60, at 73 and 74.

⁷³ *Id.*, at 74; R. Daniel Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 GOVERNMENT AND OPPOSITION 211, 228 (2017).

⁷⁴ Sadurski, *supra* note 63, at 28, in particular footnote no. 124.

⁷⁵ Sadurski, *supra* note 63, at 24.

⁷⁶ *Id.*, at 24.

Thus, the current legislative status quo regarding the regulation of the Constitutional Tribunal's procedure resembles the pre-crisis legislation. As Sadurski put it, "[t]he earlier rules which seemed so defective to PiS when it did not have a majority on the Tribunal turned out to be perfectly satisfactory once it captured the majority."⁷⁷

Comparison and synthesis: Strategies of populist court-curbing

Hungary and Poland represent the two most striking recent examples of illiberal turns, the rule-of-law deterioration and, as I argue, de-judicialization of lawmaking. They have attracted a lot of attention as the backsliding is particularly shocking within the European Union. However, they are not isolated cases and the populist attacks against courts have taken place all over the world and have included both domestic and international courts. Hence, it is essential to examine the two cases from a more general point of view and see whether there are any generalizable patterns of de-judicialization strategies.

The Hungarian and Polish examples show many similarities as to the structural outcomes of de-judicialization efforts, but also important differences as to the processes and techniques leading to de-judicialization. Both Orbán and Kaczyński had a previous governmental experience within a judicialized framework of politics.⁷⁸ Both of them were forced to retreat into the opposition. After getting the second chance, both politicians seemed to be determined to implement effectively their populist projects and they did not want to be limited by the judicialization constraints. As a result, both of them attacked the respective CCs. Using the underpinnings of the populist ideology both Orbán and Kaczyński were rather open about their efforts. Kaczyński admitted the Constitutional Tribunal could be an obstacle to his intended reforms and Orbán is transparent about his visions of Hungary as an illiberal democracy.

Yet, the techniques differed, mostly due to the different political backing of Orbán's and Kaczyński's governments. Whereas Orbán gained a constitutional majority in the parliament, Kaczyński has to play with a "mere" legislative majority. As a result, the Hungarian court-curbing was extremely complex and aimed to secure de-judicialization by all means, including judicial nominations, court-packing, restricting access to the CC, and jurisdiction stripping. By a combination of those techniques, Orbán's regime managed to get rid of historical and current limits resulting from the formerly judicialized structure of Hungarian politics.

⁷⁷ *Id.*, at 28.

⁷⁸ Orbán was a prime minister in 1998-2002, Kaczyński in 2006-2007.

Not having a capacity to change the constitution, Kaczyński had to use legislative and managerial tools to dismantle the Polish Constitutional Tribunal. The government made use of a somewhat messy personal situation at the Tribunal and gradually managed to gain majority on the bench. Meanwhile, it largely paralyzed the Tribunal's veto player capacity through meddling with the procedural rules contained in an ordinary statute lacking constitutional force. It provoked strong reactions from the Polish civil society and the Constitutional Tribunal itself. However, the fight was rather unequal, and the government ultimately managed to tame the CC.

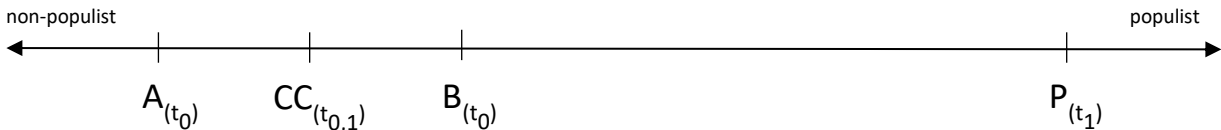
Having in mind the Hungarian and Polish cases, we can generalize and distill some broader patterns about the court-curbing process leading to de-judicialization. The de-judicialization strategies include short-term and long-term techniques. The aim of the short-term techniques is to exclude the court's power to block the populist reforms necessary to implement the populist project and consolidate the regime. This can be done in a very straightforward way by overriding the court's case law and amending the constitution as we have seen in the Hungarian case study. However, a pre-condition for employing this technique is the constitutional majority in the parliament. An alternative short-term technique is the paralysis of the court. Meddling with the procedural and organizational rules can be used to effectively prevent the court from making decisions for a certain period, as the Polish case study shows. A legislative majority is sufficient for the paralysis technique if the procedural and organizational rules are enshrined in an ordinary statute and have not been constitutionalized or entrenched.

The court cannot be held in paralysis forever. Nor can the government be constantly overriding all its rulings. Therefore, the populist actors also employ long-term techniques designed to set aside the limitations stemming from the judicialized structure of lawmaking permanently. The first group of techniques aims to restrict the channels used for transferring the political issues to the court. This can be done through access restrictions or jurisdiction stripping. If the court has not the competence to decide about certain types of issues, it is hard to judicialize such an area. Even if it has the competence, it will not be able to judicialize the area if it is not activated by other actors. As a result, the dyadic structure of politics returns as the court cannot pronounce on the issue.

Another group of long-term de-judicialization techniques aims to absorb the court's veto status, i.e. to tame the court and prevent it from deciding against the preferences of the government, at least in the major cases. Such a goal can be achieved by targeting the judicial personnel. Initially, it is likely that the court will be ideologically distant from the populist government.

Let's imagine a scenario where a populist political party (P) wins the elections for the first time and takes over the government. Judges of the CC were originally (t_0) appointed by the previous, non-populist political actors (A and B). Accordingly, the CC's preferences should be closer to the non-populist side of the spectra (CC in t_0 and t_1). Figure no. 1 illustrates the situation when two political actors (e.g. the government and the opposition party) have to agree on appointees for a constitutional judgeship. If the populists subsequently (t_1) form the government, the ideological distance between the CC and the government is likely to be high, which results in a strong veto player position of the CC.

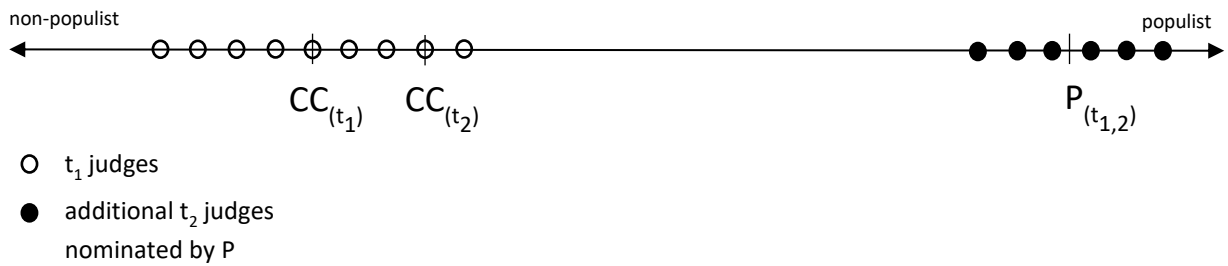
Figure no. 1: Government alteration and ideological distance of the CC



Therefore, the populist government wants to absorb the veto status of the court and aims to get the court on its side. An independent and powerful court is a major obstacle for the populist reform. But a nominal court that does not impose any major constraints on the governing actors can still serve a valuable legitimization role. The populist regimes thus preserve the CCs' existence but aim to politicize the bench through nominating loyalists.⁷⁹ The main aim is to bring the court's ideological position closer to the populist government so that the court does not veto the governmental policies. Three main steps can be taken – separately or in combination – to do that. First, populists can pack the court – increase the size of the CC and appoint loyal judges on the bench. The size of the CC's bench is usually entrenched in the constitution. Therefore, this technique is often available only to the populists with constitutional majority. Packing the court with loyalists shifts the ideological position of the court. Figure no. 2 shows a hypothetical scenario where a nine-member court was packed and the number of judges was increased to fifteen.⁸⁰ It shows that the median judge will be closer to the position of the populist government in such a case.

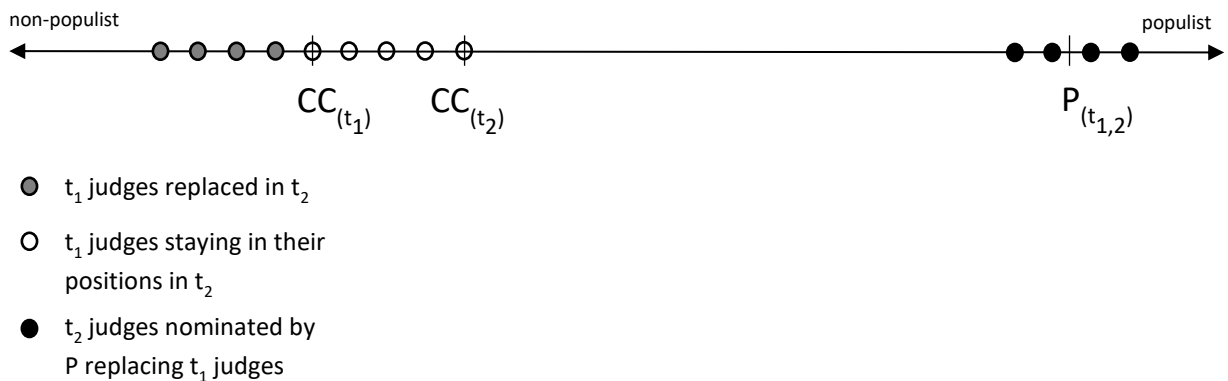
⁷⁹ Ferejohn, *supra* note 7, at 63-65.
⁸⁰ Scenarios in figures no. 2-4 presuppose that the populist party has enough power to choose the new judges on its own, without the necessity to seek agreement with another actor. See e.g. the Hungarian situation described above.

Figure no. 2: Shifting the ideological position of a court through court-packing



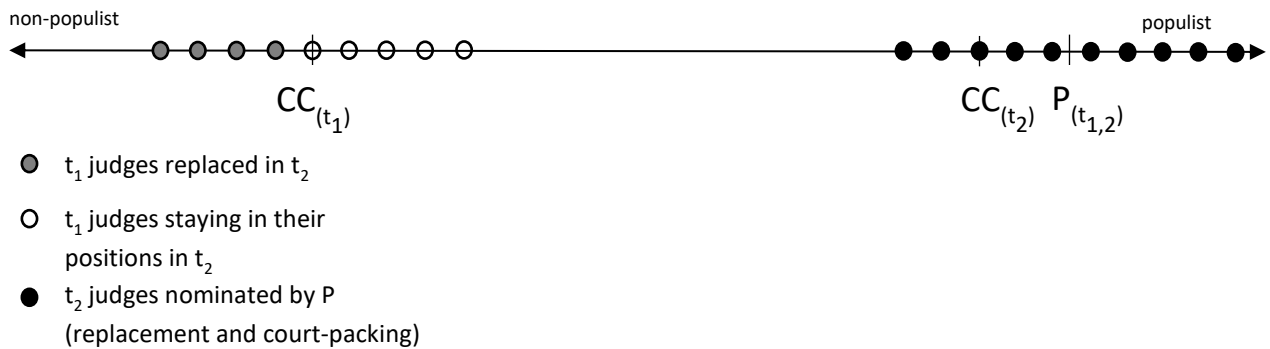
Another technique is the replacement of incumbent judges with loyalists or nominating new loyal judges on vacant positions. Depending on the number of replaced judges, the effect is the approximation of the court to the position of the government. The median judge, again, will be closer to the populist position. Figure no. 3 exemplifies a scenario where four incumbent judges of a nine-member court were replaced by four judges nominated by the populists.

Figure no. 3: Shifting the ideological position of a court through replacement



As figures no. 2 and 3 show, neither the court-packing or replacement strategies have to be sufficient on their own. If the number of new judges appointed by the populists is too low, the ideological distance may remain considerable. Hence, the most effective seems to be the combination of court-packing and replacement. Figure no. 4 illustrates a scenario where four incumbent judges are replaced by populist-appointed judges and the CC's size is increased from nine to fifteen members. The median judge of the "new" court will be ideologically considerably closer to the populist government.

Figure no. 4: Combining court-packing and replacement



All the figures exemplify model situations based on assumptions that are not absolutely valid in reality. For instance, it cannot be taken for granted that a judge is an agent necessarily holding the position of her principal. However, the aim of this section was to explain the de-judicialization strategies and motivations behind them. It is therefore sufficient if the populist governments believe the assumption. It does not mean that it will play out like that in practice.⁸¹

Furthermore, in reality the whole scenario is more complicated because CCs often decide in smaller panels. As a result the composition of the panels and engineering with those can be particularly important for the absorption techniques.⁸²

Finally, all the listed techniques can be accompanied by the populists' efforts to decrease the court's long-term ability to defend itself and to defend the liberal democratic values. An important technique is decreasing the CC's authority. Efforts to decrease the court's social legitimacy are likely, i.e. rhetorical attacks delegitimizing the CC. The instruments of the populist ideology and style can be particularly useful here as they provide the basis for justifying the anti-court behavior.

V. Effects of de-judicialization: What is at stake?

Given all those techniques, the question what we lose and what we risk with growing de-judicialization of politics in the populist regimes arises. The rise of constitutional adjudication and judicialization of politics provoked a huge debate about the lack of democratic legitimacy of CCs. There have been many concerns about the counter-majoritarian difficulty of CCs – how

⁸¹ But see Solyom's and Sadurski's assessment of the judicial behavior of the new judges of CCs in Hungary and Poland. See Solyom, *supra* note 41, at 23, in particular footnote no. 40; Sadurski, *supra* note 63, at 31 ff.

⁸² Sadurski (*supra* note 63, at 21) points out the reshuffling of the chambers of the Polish Constitutional Tribunal.

can unelected judges block reforms adopted by a democratically elected majority?⁸³ Populists claim that the de-judicialization addresses those concerns and reinforce “true” democracy. More generally, populist thinkers argue that populism strengthens the democratic element in governance at the expense of the technocratic one. They claim that populism gives the people stronger voice in politics, supports their political participation and enhances democratic accountability of the governing actors. Ernesto Laclau argued that populism is a response to the crisis of representation and that populism brings about democratizing effects.⁸⁴

I disagree. I believe we should look beyond this narrative and think what we risk losing with attacks on CCs and de-judicialization of politics. It seems to me that the populist crusade against CCs implies not only a threat for substantive values such as fundamental rights, but also a threat for formal and procedural aspects of democracy. De-judicialization actually lowers accountability of the governing political elite for its lawmaking activities, it decreases supervision of fairness of democratic procedures, and it takes away an important political participation channel from ordinary citizens. Those effects may sound somewhat paradoxical since the populists often stress the importance of accountability of the elites and participation of the people.

Regarding the decrease in accountability, de-judicialization changes the structure of legislative politics. If the effort to strip the CC of its effective veto player status is successful, it is not likely that the court will rule against the preferences of the populist majority – at least not in the important cases. Of course, a CC may still from time to time quash certain legislative acts as unconstitutional and discipline the lawmaker. Otherwise, its function of legitimizing the government would be extremely untrustworthy. But the major legislation adopted by the populist regime is likely to withstand constitutional scrutiny if the government manages to approximate the ideological position of the court to its own. Hence, the populist de-judicialization strategies will likely lead to the CC’s loss of effective and independent veto player status. Eliminating the CCs’ veto player status returns politics to a dyadic structure. It can be dyadic *de iure* if the court was stripped of jurisdiction over certain areas, or *de facto* if the court was paralyzed, is regularly overridden or was “tamed” through personnel politics. Legislative politics will take place within a largely non-judicialized environment driven by political means of dispute resolution. At the same time, the pedagogical effect of judicialization is likely to fade away as there is little need to anticipate the CC’s reaction. That reaction will

⁸³ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

⁸⁴ ERNESTO LACLAU, *POLITICS AND IDEOLOGY IN MARXIST THEORY* (1977).

likely be in line with the government's preferences, or might be ignored or overridden. As a result, we can lose an important remedial venue for defective legislation and for holding the government accountable for unconstitutional legislation.

This has repercussion for the supervision of fairness of democratic procedures. One of the functions of constitutional law is the protection of the democratic form, for instance through regulation of elections or protection of political minorities. Judicial enforcement of those parts of constitutional law is crucial for democracy. However, de-judicialization likely results in the loss of significance of those parts of constitutional law. If the CC is not likely to enforce them, their effectiveness becomes insecure and subject to the government's will. In this way the Schmittian idea of supremacy of constituent power over the constitution and, more generally, of politics over law is revived in a populist de-judicialized regime.⁸⁵ Those developments will move the functioning of the entire political system towards extreme majoritarianism and strengthening of the executive rule.⁸⁶ Similarly, the lack of procedural and substantive safeguards of rights of political minorities might gradually lead to their marginalization.

Finally, de-judicialization strips ordinary citizens of an important channel of political participation – a possibility to initiate constitutional review of legislation and express their own views about constitutionality.⁸⁷ Judicialization through CCs does not only imposes constraints, but also has an enabling dimension. The de-politicization of certain policy areas due to judicialization of lawmaking does not necessarily imply avoidance of discussion as regularly argued. Transferring certain issues to the courtroom changes the type of discourse, but does not avoid discussion. On the contrary, the discussion might be actually augmented by judicialization. CCs are first-class deliberative institutions, which are required to account for their decisions by giving reasons and “public reason is the sole reason the court exercises.”⁸⁸ At the same time, judicialization of lawmaking does not necessarily lead to disempowerment of individual citizens in the public spheres. In some countries, including Hungary and Poland, individual citizens are entitled to challenge the constitutionality of legislation before a CC.

⁸⁵ See *supra* note 25.

⁸⁶ Samuel Issacharoff, Safeguarding Democratic Institutions, *Verfassungsblog* (Apr 29, 2017), <https://verfassungsblog.de/safeguarding-democratic-institutions/>.

⁸⁷ Hereinafter my argument addresses CCs accessible by individuals.

⁸⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 235 (1993). See also John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in *CONSTITUTIONAL JUSTICE, EAST AND WEST* (Wojciech Sadurski ed., 2002); Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 *ICON* 525 (2014).

The possibility to take part in the proceedings before the CC offers the citizens a new dimension of participation in public affairs through a right to complain.⁸⁹ Fundamental rights can thus be viewed as “tickets to CCs as deliberative forums.”⁹⁰ In this sense, constitutional adjudication and judicialization also empower citizens. Constitutional adjudication provides a possibility to present one’s view about the legislation before the court, which embodies a dignitarian idea of respecting that the addressees of legal norms are capable of explaining themselves.⁹¹ As a result, the voice of individual citizen is increased through judicialization since citizens “do not just add their own vote to millions of other ballots every four or five years, but are part of a constitutional conversation and exchange of arguments with their Justices, the representatives of legal and constitutional order in the country.”⁹² The populist de-judicialization strategies eliminate this participation channel or significantly diminish it – through a court-curbing technique of restricting access to the court, or through decreasing the chance that the court will decide against the preferences of the government. In other words, de-judicialization either shuts down the described participation and empowerment channel for ordinary citizens or at least significantly lowers its effectiveness.

Hence, I think that de-judicialization by populists is not that much driven by an interest in giving voice to the people, in greater democratic deliberation, political participation of ordinary people and greater accountability of politicians. It seems to me that the driving force is rather the effort to push through a vision of substantive good advocated by one part of the society without the necessity of testing these ideas in the democratic deliberation. And that is troubling from the point of view of democracy as such and it significantly problematizes the populist narrative about democracy-enhancing court-curbing.

VI. Conclusion

For the past decades, debates about constitutional adjudication and democracy were dominated by discussions about judicialization and rise of juristocracy. Judicialization of politics was considered a one-way path in those debates. The recent unprecedented rise of populism in certain regions, however, shows that there is an underlying risk of a contrary tendency towards de-judicialization. Populism as an ideology promotes unmediated relation between political leaders and the public, and aims to enforce the will of the ordinary people authentically. Checks

⁸⁹ John Ferejohn & Pascale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEXAS LAW REVIEW 1670, 1687 (2004).

⁹⁰ Komárek, *supra* note 88, at 534.

⁹¹ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3 (2011).

⁹² Ferejohn & Pasquino, *supra* note 89, at 1687.

and balances structures imposing constraints on lawmaking, such as independent constitutional adjudication, are viewed as obstacles compromising democracy. Accordingly, populists in government make use of this ideological justification of court-curbing and quite openly attack CCs in order to de-judicialize politics, allegedly in the name of greater democracy.

This essay tried to detect the main de-judicialization strategies employed by populists, explain their motivations and point out what we can lose with continuing de-judicialization. What is at risk are not only substantive values of liberal constitutionalism, but also the formal and procedural aspects of democracy as such. De-judicialization by populists implies the risks of decreasing accountability of the governing political elite for its lawmaking activities, worse supervision of fairness of democratic procedures, and elimination of an important political participation channel for ordinary citizens. De-judicialization strategies (aim to) strip the CCs of effective veto player status and, thereby, bring politics back to the dyadic structure. That lowers the chances to hold the governing elite accountable for their legislative actions and makes essential areas of constitutional law hardly enforceable. Furthermore, it makes constitutional litigation as an important participation channel for ordinary individual citizens significantly less effective and attractive.

Thus, the populist quest for de-judicialization should be seen as an extremely troubling phenomenon for democratic politics. Although this essay was based on the study of Hungary and Poland, populist parties strengthen across the entire East-Central Europe and elsewhere. The scenario of negative effects of de-judicialization in the populist regimes is not absolutely inevitable. It depends on the actions taken by non-populist domestic and international actors and on their capacity to counter the rise of populism and the consolidation of the populist regimes. Still, the scenario shows the likely effects of de-judicialization if the populist growth is not countered. Thus, I believe we should take the populist challenge to CCs and – as this essay argues – to democracy seriously, learn lessons from the identified de-judicialization strategies and try to prevent them until there is time.